

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF LOUISIANA  
SHREVEPORT DIVISION

LEON MITCHELL

CIVIL ACTION NO. 11-0256

versus

JUDGE WALTER

WARDEN, LOUISIANA STATE  
PENITENTIARY

MAGISTRATE JUDGE HORNSBY

**MEMORANDUM ORDER**

The final date for filing a timely notice of appeal was March 28, 2014. Petitioner dated his notice of appeal April 9, 2014, but it was not filed by the Clerk of Court until May 1, 2014. The Fifth Circuit remanded the appeal for a determination as to whether Petitioner timely filed his notice of appeal by delivering it to the prison officials before the deadline. See F.R.A.P. 4(c)(1).<sup>1</sup> The matter was referred to the undersigned for evidentiary proceedings and a recommendation.

This court's records indicate that Petitioner delivered his notice of appeal by having prison officials at the Louisiana State Penitentiary scan his documents and email them to the Clerk of Court pursuant to a program that has been in place since January 2012. Prison

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<sup>1</sup> The Rule provides: "If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid." The rule was revised to add this language after Houston v. Lack, 108 S.Ct. 2379 (1988) held that a habeas petitioner's notice of appeal "was filed at the time petitioner delivered it to the prison authorities for forwarding to the court clerk."

officials, on May 1, 2014 scanned and emailed both Petitioner's Motion to Proceed In Forma Pauperis On Appeal (Doc. 21) and his Notice of Appeal (Doc. 20).

The first page of the two-page motion is stamped with an indication that five pages were "SCANNED at LSP and Emailed" on May 1, 2014. The page is also stamped: "RECEIVED May 01, 2014 Legal Programs Department." The three-page notice of appeal does not include any such stamps on it, but the Clerk of Court has maintained the email record from May 1, 2014 and has verified that the two documents were emailed together on May 1, 2014.

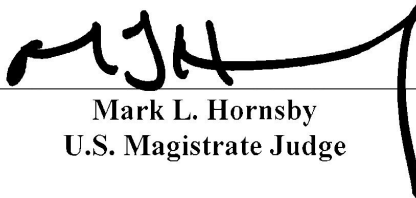
Petitioner dated the motion April 9, 2014, the same date he wrote on his notice of appeal. A Certificate of Account stating how much money Petitioner had in his inmate account is attached to the motion. A prison official hand wrote the date and stamped it as certified April 16, 2014. The court does not have any additional information regarding when Petitioner delivered his documents to prison officials for the purpose of having them delivered to the Clerk of Court. The parties will be permitted the opportunity to file any evidence they may have with regard to that issue.

**Petitioner** is hereby granted until **October 27, 2014** to file all receipts, records, affidavits, declarations in compliance with 28 U.S.C. § 1746, or other evidence that he contends is relevant to when his notice of appeal was delivered to prison officials for delivery to the Clerk of Court. The evidence may be accompanied by a memorandum that explains the evidence.

**The State** may file any evidence or memorandum in response to Petitioner's submissions by **November 7, 2014**.

If any party wishes to rely upon the testimony of a witness, the party should submit that witness's testimony in an affidavit sworn before a notary or a declaration made in compliance with 28 U.S.C. § 1746.

THUS DONE AND SIGNED at Shreveport, Louisiana, this 8th day of October, 2014.



Mark L. Hornsby  
U.S. Magistrate Judge